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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

QIN CHEN,)	No. C 07-2188-WDB
Plaintiff,)	
v.)	
MICHAEL CHERTOFF, Secretary)	DEFENDANTS' REPLY
of Department of Homeland Security;)	
EMILIO T. GONZALEZ, Director of the)	
U.S. Citizenship and Immigration Services;)	
CHRISTINA POULOS, Acting Director of)	
USCIS, California Service Center; and)	
ROBERT S. MULLER, Director)	
of Federal Bureau of Investigation,)	
Defendants.)	

I. INTRODUCTION

The defendants wish to stand on the arguments they have made in their motion for summary judgment and in their opposition to plaintiff's cross-motion for summary judgment. The defendants also acknowledge this Court's oral ruling in *Xin Xu v. Chertoff*, 07-0938-WDB, in which the Court ruled that a I-485 application that was pending for approximately the same amount of time as the plaintiff's I-485 application in this case, was unreasonably delayed. Finally, the defendants wish to provide the Court with some additional information regarding the availability of a visa for the plaintiff if and when her I-485 application is granted.

II. DISCUSSION

By statute, only about 140,000 aliens and their derivative relatives can get green cards through employment-based categories during each fiscal year, with percentage limits set by Congress per country and within each preference category. Supplemental Declaration of Gerald Heinauer ¶ 7; 8 U.S.C. § 1151(d) Unused visa numbers under the annual quota do not carry over from one fiscal year to the next. *Id.* Every attempt is made to maximize number use under the annual numerical limit. *Id.* These visa numbers are tracked and issued by the Department of State. *Id.* The priority date for visa number purposes in the plaintiff's case is March 11, 2004. *Id.*

Visa numbers for second preference workers from China will be unavailable for the month of December 2007 due to a visa retrogression from the U.S. State Department. Supplemental Heinauer Declaration ¶ 8. In September 2007, the Department of State indicated there would be visa numbers for second preference Chinese workers available for petitions bearing priority dates earlier than January 1, 2006. *Id.* USCIS will not be able to complete plaintiff's case in December 2007. *Id.* Her case cannot be completed until a visa number becomes available to her. *Id.*

The purpose of an I-485 application, in conjunction with an I-140 petition, is to obtain lawful permanent resident status for the alien worker and any qualified derivative spouse and children. Supplemental Declaration of Gerald Heinauer ¶ 9. There must be a visa number available in the relevant category at the time an employment- based adjustment of status application (I-485) is filed. *Id.*

After security checks are completed and all necessary evidence is obtained and evaluated, the application for adjustment of status may be approved, in the exercise of discretion, if a visa number is available at that time and is authorized by the Department of State. Supplemental Heinauer Declaration ¶ 11.

Plaintiff was able to file her I-485 application concurrently with her Form I-140 on March 11, 2004, because visa numbers were current for all second preference workers according to the February 2004 visa bulletin. Supplemental Heinauer Declaration ¶ 12. However, according to the December 2007 visa bulletin, the new fiscal year cut-off dates for the second preference Chinese applicant will regress to January 1, 2003.

1 In an attempt to generate increased demand by USCIS for adjustment of status cases before the
2 end of the fiscal year, the Department of State opened all employment-based visa preference
3 categories (with one exception not relevant here) for all countries in the July 2007 visa bulletin.
4 Supplemental Heinauer Declaration ¶ 18. As a result of a USCIS backlog reduction effort during
5 June 2007 through July 1, 2007, involving almost 60,000 cases, the Department of State
6 announced on July 2, 2007, that there would be no further authorizations of visa numbers during
7 July. *Id.* Nevertheless, USCIS continued to permit new applicants for adjustment of status to
8 apply under the July 2007 visa bulletin's "current in all categories" listing for purposes of meeting
9 the requirement that a visa number be available at the time of filing the adjustment of status
10 application. *Id.*

11 Visa number allocation requests are made at the time a case is deemed to be finally approvable
12 for adjustment of status, if visa numbers are available in the applicable preference and per country
13 category on that date. Supplemental Heinauer Declaration ¶ 19. The Nebraska Service Center was
14 operating and visa number requests were made on Sunday, July 1, 2007, for cases that were
15 deemed ready for final adjudication. *Id.* Visa numbers were unavailable for all employment-based
16 categories during August 2007. Visa numbers will be unavailable for second-preference Chinese
17 cases during December 2007. *Id.*

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19 Dated: November 29, 2007

Respectfully submitted,

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23 /s/
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26 Attorneys for Defendants
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